IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY (Newark)

TREMAINE WATKINS, on behalf of herself and all others similarly situated, Plaintiff, v. PRESSLER & PRESSLER LLP a/k/a Pressler and Pressler LLP; JOHN DOE 1-10; and XYZ CORPORATION 1-10, Defendants.	2:16-cv-00119-MCA-LDW RETURN DATE: TBD

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

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Dated: June 24, 2016

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INTRODUCTION

The claims under the Fair Debt Collection Practices Act ("FDCPA"), 15 *U.S.C.* §1692 *et seq.*, which Plaintiff, Tremaine Watkins ("Plaintiff") has pleaded in her Class Action Complaint more than meet the necessary threshold of adequacy to withstand Defendant Pressler and Pressler's ("Pressler") motion for judgment on the pleadings. In fact, the vast majority of the arguments presented in Pressler's motion are actually directed to the merits of Plaintiff's claims[1], and not to whether the Complaint has stated a cognizable cause of action.

In her Complaint, Plaintiff alleges that Pressler obtained and/or attempted to obtain a waiver, through the form Consent Order that the law firm sent to Plaintiff and other similarly-situated consumers, of their rights under State and Federal law to receive advance notice of a post-judgment wage execution. Although Pressler sought to have Plaintiff and the putative class members waive very specific rights, which include the right to request a hearing prior to the issuance of a wage execution order, specific monetary limits on the amount of the wage garnishment, and the prohibition on employer retaliation against employees with garnished wages, Pressler only provided them with an incomplete and deficient notice as to those rights and the consequences of waiver. As a result, Plaintiff and the putative class members were not made aware – in of itself a substantive right -- of the very rights and protections that they were being asked to waive.

[1] Although Pressler couches the instant motion as a motion for judgment on the pleadings, both the reliance upon matters outside the pleadings and the arguments attacking the merits of the claims in this motion demonstrate that it is more properly viewed – albeit premature – as a motion for summary judgment. While Plaintiff also believes that the matter could ultimately be decided on summary judgment in her favor, it would be premature to file such a motion until after the issue of class certification is decided.

The consent orders which Pressler used, by their own admission, time and time again, create an unfair and unlawful imbalance, where Plaintiff and those similarly situated – who must be viewed under the standard promulgated by the FDCPA as the "least sophisticated consumers" were asked to waive their statutory rights without having been first provided full and accurate information as to the rights which were to be waived. By withholding this information, the dissemination of which is required by the Court Rules, New Jersey law and federal law, Pressler improperly sought the installment payment of funds from Plaintiff and the putative class members which otherwise would have been exempt from wage execution.

The Complaint alleges that Pressler's conduct in this regard constitutes an unlawful debt collection practice in violation of the FDCPA, which prohibits the use of false, deceptive, and misleading representations and/or unfair or unconscionable means in the collection of debts, and which would entitle Plaintiff and the putative class members to statutory damages. 15 *U.S.C.* §1692e, §1692f. The cause of action asserted in the Complaint is quite clearly a claim upon which relief can be granted, and thus Pressler's motion for judgment on the pleadings should be denied in accordance with the presumption against such dismissals, just as it was denied by Judge Barry A. Weisberg when Pressler made the same exact arguments in a motion to dismiss in *Ortiz-Rodriguez v. Pressler & Pressler*, Docket No. Mid-L-7253-13 (Feb. 28, 2014), *see Exh. A to the Declaration of Bharati Sharma Patel ("Patel Decl.")*.

LEGAL ARGUMENT

I. PLAINTIFF PLEADED CLAIMS SUFFICIENT TO WITHSTAND A MOTION FOR JUDGMENT ON THE PLEADINGS UNDER FED. R. CIV. P. 12(c).

The standard of review for a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is plenary. *Rosenau v. Unifund Corp*., 539 F.3d 218, 221 (3d Cir. 2008).

A motion for judgment on the pleadings is reviewed under the same standards that apply to a motion to dismiss under Rule 12(b)(6). *Revell v. Port Auth. Of N.Y. & N.J.*, 598, F.3d 128, 134 (3d Cir. 2010). "Under Rule 12(c), judgment will not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law. In reviewing the grant of a Rule 12(c) motion, we must view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Rosenau*, 539 F.3d at 221 (*quoting Jablonski v. Pan Am. World Airways, Inc*., 863 F.2d 289, 290-91 (3d Cir. 1988)).

The Third Circuit has further held that "[L]ender-debtor communications potentially giving rise to claims under the FDCPA . . . should be analyzed from the perspective of the least sophisticated debtor. This standard is lower than the standard of a reasonable debtor; thus, [a] communication that would not deceive or mislead a reasonable debtor might still deceive or mislead the least sophisticated debtor. We use the least sophisticated debtor standard in order to effectuate the basic purpose of the FDCPA: . . . to protect all consumers, the gullible as well as the shrewd." *Rosenau v. Unifund Corp*., 539 F.3d 218, 221 (3d Cir. 2008) (internal quotation marks, citation, and alteration omitted). Nevertheless, the Court presumes that even the least sophisticated debtor reads a collection notice with "a basic level of understanding and willingness to read with care." *Id*. (internal quotation marks and citation omitted).

An application of these principles to Plaintiff's complaint should lead directly to a denial of Pressler's motion for judgment on the pleadings for failure to state a claim. The Class Action Complaint clearly states that Pressler, in its attempts to collect consumer debts, repeatedly sent Consent Orders to not only the named Plaintiff, but numerous other New Jersey consumers whom Pressler had sued. The Consent Orders required Plaintiff and the putative class members to waive certain very important rights as to post-judgment wage execution, but failed to provide them with the required notice of those rights and the consequences arising from a waiver of those rights. Pl. Compl. ¶¶8-14, 21-22, CM/ECF Doc. No. 1.

The Complaint further alleges that, rather than providing Plaintiff and the other consumers with Appendix XI-I to the New Jersey Court Rules, a form whose content was developed and promulgated by the New Jersey Supreme Court to properly inform individuals of their rights in post-judgment wage executions, Pressler elected to create and use its own form, which fails to provide several crucial pieces of information required by the Court Rules. Pl. Compl. ¶¶13-14, 21-22.

Put quite simply, Pressler's motion for judgment on the pleadings contends that Plaintiff has failed to adequately state a cause of action upon which relief can be granted. Put equally as simply, the claims in this matter assert that Pressler engaged in false, deceptive, and misleading representations and/or unfair or unconscionable means in its attempts to collect debts allegedly owed to Pressler's clients.

Under the standard of review mandated by the Third Circuit in weighing a motion for judgment on the pleadings, it is clear that the threshold for adequacy has not only been met, but has also been surpassed, in Plaintiff's Complaint. Accordingly, it is respectfully submitted that the motion for judgment on the pleadings should be denied.

II. PLAINTIFF'S COMPLAINT STATES A VALID CAUSE OF ACTION UNDER THE FAIR DEBT COLLECTION PRACTICES ACT

Pressler's broad contention that the Complaint should be dismissed because Plaintiff has not stated a valid cause of action under the Fair Debt Collection Practices Act cannot withstand any measured scrutiny.

The FDCPA was enacted by Congress in 1977, in part, for the purpose of eliminating "abusive, deceptive, and unfair" practices by debt collectors. 15 *U.S.C.* §1692(a) and (e); *Pollice v. National Tax Funding, L.P.*, 225 *F.*3d 379, 400 (3d Cir. 2000). The statute is designed to protect consumers from the abusive collection practices, regardless of whether there is a valid debt. *Baker v. G.C. Serv.*, 677 *F.*2d 775, 777 (9th Cir. 1982); *McCartney v. First City Bank*, 970 *F.*2d 45, 46 (5th Cir. 1992). The FDCPA enables an individual consumer to act as a "private attorney general," righting wrongs that the state and federal governments do not have the time or resources to address. *Graziano v. Harrison*, 950 *F.*2d 107, 113 (3d. Cir. 1991).

The Class Action Complaint alleges that Pressler violated sections 1692e and 1692f of the FDCPA, which governs the conduct of those who would attempt to collect consumer debts. A debt collector that fails to comply with any provision of the FDCPA will be liable to the consumer for statutory damages and other remedies. 15 *U.S.C.* §1692k. Furthermore, "[a]ttorneys who regularly engage in debt collection or debt collection litigation are covered by the FDCPA, and their litigation activities must comply with the requirements of that Act." *Piper v. Portnoff Law Assocs. Ltd.*, 396 *F.*3d 227, 232 (3d Cir. 2005) (*citing Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, 131 L. Ed. 395 (1995)).

The FDCPA defines "debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes," "consumer" as "any natural person obligated or allegedly obligated to pay any debt," and "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 *U.S.C.* §1692a. The Complaint alleges that Plaintiff and those similarly situated are consumers who are "are natural persons obligated to pay debts that were incurred primarily for personal, family and/or household purposes," Pl. Compl. at ¶¶39, and that Plaintiff and those similarly situated are consumers allegedly obligated to pay debts incurred primarily for personal, family, and/or household purposes, Pl. Compl., ¶39. The Complaint also alleges that Pressler attempted to collect a debt from Plaintiff and those similarly situated, Pl. Compl. ¶23, that Pressler regularly uses the mail, telephone or other instruments of interstate commerce in its attempts to collect consumer debts, Pl Compl. ¶¶19-20, and that the debts which Pressler attempted to collect were consumer debts, Pl. Compl. ¶39-40. The Complaint further alleges that Pressler violated the FDCPA by obtaining or attempting to obtain improper waivers of rights concerning wage garnishment, Pl. Compl. ¶¶42-44, and, as a result, that Plaintiff and those similarly situated are entitled to statutory damages. Pl. Compl. ¶27, 33-34.

Notably, in its motion, Pressler does not dispute that it is a debt collector within the meaning of the FDCPA, or that the Consent Orders at issue in this litigation were sent in an attempt to collect a debt. The Complaint clearly states that Plaintiff and those similarly situated are "natural persons obligated to pay debts that were incurred primarily for personal, family and/or household purposes," Pl. Compl. at ¶¶39, and nowhere does Pressler's motion argue that the debt allegedly owed by Plaintiff is not actually a consumer debt.

The Complaint therefore adequately pleads the elements of an FDCPA claim, and Pressler's motion should be denied based on the liberal standards governing such motions articulated in *Rosenau* set forth above. The following sections are provided to provide a more detailed explanation of Pressler's violations of the FDCPA, and to respond to the arguments in Pressler's moving brief.

A. The New Jersey Courts Have Established Strict Requirements for Pre-Garnishment Notice and the Process for Waiver of that Notice.

The New Jersey Court Rules provide that "[p]roceedings for the issuance of an execution against the wages … of a judgment debtor shall … be on notice to the debtor." *R.* 4:59-1(e). The Rule sets forth the specific information that must be included in the court-mandated notice as follows:

> (1) that the application will be made for an order directing a wage execution to be served on the defendant's named employer,
>
> (2) the limitations prescribed by 15 U.S.C.A. §1671-1677, inclusive and N.J.S. 2A:17-50 et seq. and N.J.S. 2A:17-57 et seq. on the amount of defendant's salary which may be levied upon,
>
> (3) that defendant may notify the court and the plaintiff in writing within ten days after service of the notice of reasons why the order should not be entered,
>
> (4) if defendant so notifies the clerk, the application will be set down for hearing of which the parties will receive notice as to time and place, and if defendant fails to give such notice, the order will be entered as of course, and
>
> (5) that defendant may object to the wage execution or apply for a reduction in the amount withheld at any time after the order is issued by filing a written statement of the objection or reasons for a reduction with the clerk and sending a copy to the creditor's attorney or directly to the creditor if there is no attorney, and that a hearing will be held within seven days after filing the objection or application for a reduction.
>
> [*R.* 4:59-1(e)]

The judgment creditor must file proof of service of this notice on the judgment debtor before the court can issue a wage execution order. *Id.*

The New Jersey Supreme Court has developed and approved a form Notice of Application for Wage Execution, set forth in Appendix XI-I to the New Jersey Court Rules. The Court Rules state that Appendix XI-I "shall be used" in all actions pending in the Law Division, Civil Part, and the Special Civil Part. *R.* 4:59-1(i)[*emphasis added*].

The judicially-mandated Notice of Application contains all of the information required by *Rule* 4:59-1(e) and the statutes referenced therein. The current form of Notice includes the following text:

> TAKE NOTICE that an application is being made by the judgment-creditor to the above-named court, located at ________________________________, New Jersey for a Wage Execution Order to issue against your salary, to be served on your employer, ____________________________ (name and address of employer), for: (a) 10% of your gross salary when the same shall equal or exceed the amount of $217.50 per week; or (b) 25% of your disposable earnings for that week; or (c) the amount, if any, by which your disposable weekly earnings exceed $217.50, whichever shall be the least. Disposable earnings are defined as that portion of the earnings remaining after the deduction from the gross earnings of any amounts required by law to be withheld. In the event the disposable earnings so defined are $217.50 or less, no amount shall be withheld under this execution. In no event shall more than 10% of gross salary be withheld. Your employer may not discharge, discipline or discriminate against you because your earnings have been subjected to garnishment.
>
> You may notify the Clerk of the Court and the attorneys for judgment-creditor, whose address appears above, in writing, within ten days after service of this notice upon you, why such an Order should not be issued, and thereafter the application for the Order will be set down for a hearing of which you will receive notice of the date, time and place.

This court-mandated notice "informs the judgment debtor not only (1) that a wage execution application has been made, but (2) the amount which is permitted to be deducted, (3) the protections against discharges, discipline, or discrimination by an employer because of wage garnishment, (4) the process by which to oppose the order and request a hearing *prior* to wage garnishment, and (5) the process by which defendant can object to the wage execution or apply for a reduction in the amount withheld after the wage execution has been issued." *Midland Funding, L.L.C. v. Giambanco*, 422 *N.J. Super*. 301, 307 (App. Div. 2011).

The required pre-execution notice "is not an empty, technical, bureaucratic requirement." *Giambanco*, 422 *N.J. Super.* at 307. The New Jersey Supreme Court has recognized that "[d]ue process is implicated in this case because a wage garnishment affects defendant's interest by depriving him of the continued use of some portion of his property." *First Resolution Inv. Corp. v. Seker*, 171 *N.J.* 502, 513 (2002) (*citing Township of Montville v. Block 69, Lot 10*, 74 *N.J.* 1, 8 (1977)). "Indeed, the point behind the income limitation trigger in the statute … is a declaration of the public policy to safeguard a reasonable sum for sustenance from the hands of creditors." *Greate Bay Hotel & Casino v. Guido*, 249 *N.J. Super.* 301, 304 (App. Div. 1991) (*citing Chelsea-Wheeler Coal Co. v. Marvin*, 134 *N.J. Eq.* 432, 439 (E. & A. 1944)).

The Appellate Division has held that a judgment debtor may waive his or her right to the required pre-garnishment notice, but only if the waiver is "***knowing and informed***." *Giambanco*, 422 *N.J. Super.* at 305 (emphasis added). "If the right to notice and an opportunity to be heard are to be waived then the waiver must be 'a voluntary, clear and decisive act, implying an election to forego some advantage which the waiving party might have insisted on.'" *Id.* at 316 (*quoting Deerhurst Estates v. Meadow Homes, Inc.*, 64 *N.J. Super.* 134, 145 (App. Div. 1960), *certif. denied*, 34 *N.J.* 66 (1961)). In order for such a waiver to be knowing and informed, the judgment debtor must receive a notice of their "important rights and consequence of a waiver…." *Id.* at 311. In other words, judgment debtors must still receive a notice sufficient to inform them of the rights they are being asked to waive, and the consequences of waiving those rights, even in the event they agree to a waiver of the court-mandated official notice.

In *Giambanco,* the court noted that the proposed waiver being reviewed was deficient because the judgment debtor "would completely lose her right to object to the garnishment before it starts," and that "the lack of knowledge extends not merely to the pre-garnishment right to object to the garnishment but also to the limit on how much can be taken out." *Giambanco*, *Id.* at 307-08. The court recognized that many judgment debtors "may already be strapped for cash, may precipitously agree to the consent judgment without knowing that he or she may seek a reduction in the amount of wage execution." *Id.* at 312. Such judgment debtors may agree to make direct payments "without knowing that a particular hardship may, following a hearing, result in a reduction of the amount of wages subject to garnishment." *Ibid.* The court clearly was concerned that the notice failed to notify the judgment debtor of her right to request a hearing to object to the garnishment prior to execution, and the monetary limits on garnishments.

These principles of fairness to the judgment debtor were also addressed in *Seker*, *supra*, in which the New Jersey Supreme Court directed the Civil Practice Committee to amend Appendix XI-I to include a notice of the right to object to a wage garnishment after it has issued, in order to ensure that the model form included all of the information set forth in *Rule* 4:59-1(e). *Seker*, 171 *N.J.* at 516. The Court made this determination "not because of a constitutional mandate, but as a matter of fairness and sound public policy." *Id.* at 515.

Accordingly, any consent order that contains a waiver of the judgment debtor's rights related to wage executions must be "entered with the judgment debtor's full knowledge and understanding of the consequences of the waiver." *Giambanco*, at 422 *N.J. Super.* at 313.

The foregoing requirements are well-known to Pressler, whose attorneys represented the plaintiff in *Giambanco* and participated as *amicus curiae* in *Seker*. Nonetheless, the waiver provision in the consent orders that Pressler sent to Plaintiff and other New Jersey consumers lack notice of the critical rights identified by the New Jersey Courts as necessary for any knowing and informed waiver of those rights.

B. Pressler's Form Consent Order is Deficient and Withholds Notice of Important Rights from Judgment Debtors.

Exhibits K through Z attached to Pressler's moving papers demonstrate that Pressler has repeatedly used the same form of consent order and improper waiver provision with numerous other New Jersey consumers. These Consent Orders all state that, upon default, "a wage execution shall issue without further notice to the said Defendant(s) upon the filing of a certification of default by Attorneys for Plaintiff." Pl. Compl., Ex. A. The "waiver/acknowledgment" term in each of these consent orders states as follows:

> I hereby agree to the terms of this Consent Order, and have knowingly and voluntarily waived operation of the provisions of any statute or court rule including, but not limited to, *N.J.S.A.* 2A:17-50(a) and/or *R.* 4:59-1(e), which, but for my consent and/or court order, would require prior notice before a wage execution be issued against any wages. I further understand that if a wage execution should issue pursuant to our agreement herein, i.e. without notice, the amount of any such garnishment would nonetheless be limited by certain state and federal statutes, namely, *N.J.S.A.* 2A:17-50 et seq. and *N.J.S.A.* 2A:17-57 et seq. and 15 *U.S.C.A.* 1671-1677, inclusive. Further, I understand that even if such garnishment is issued without notice I nonetheless retain my right to object to, or request a reduction in, the amount withheld at any time after any such execution order might be issued by filing a written notice of objection, or reasons for a reduction, with the clerk and sending a copy to the creditor's attorney. *R.* 4:59-1(e) requires that a hearing on any said objection/request will be held by the court within seven (7) days after filing the objection or request for reduction.
>
> [Pl. Compl., Ex A, para. 10]

Among other deficiencies, this "waiver/acknowledgment" term lacks an explicit notice of the following rights:

- That the judgment debtor is waiving his or her right to file an objection and request a hearing as to why a wage garnishment order should not be issued *prior to* the issuance of a wage execution, a notice which is required to be given by *Rule* 4:59-1(e)(3)-(4);

- The specific dollar figures and percentage limitations on the amounts that may be garnished from wages, a notice which is required to be given by *Rule* 4:59-1(e)(2) and *N.J.S.A.* 2A:17-56, and which are clearly set forth in Appendix XI-I; and

- That the judgment debtor's employer is prohibited from discharging him or her by reason of a wage garnishment, a notice which is required be given by *Rule* 4:59-1(e)(2) and 15 *U.S.C.* §1674, and which is clearly set forth in Appendix XI-I.

The actual monetary and percentage limitations on wage executions are clearly explained in the model notice at Appendix XI-I. However, similar to the consent order examined in *Giambanco*, Pressler's consent order "does not fully inform [Plaintiff] of the notice provisions contained in *N.J.S.A.* 2A:17-50(a) and *Rule* 4:59-1(e) [now subpart (e)] which [Plaintiff] waived by executing the consent judgment." *Giambanco*, 422 *N.J. Super.* at 315.

Pressler's mere reference to the applicable statutes does not cure these deficiencies. *Rule* 4:59-1(e) and the *Giambanco* decision requires that the judgment debtor receive notice of "the limitations prescribed by" the applicable statutes, not the statutory citations. When interpreting the Court Rules, "[t]he Court must ascribe to the words of the rule their ordinary meaning and significance and read them in context with related provisions so as to give sense to the court rules as a whole . . . ." *Wiese v. Dedhia*, 188 *N.J.* 587, 592 (2006) (*quoting DiProspero v. Penn*, 183 *N.J.* 477, 492 (2005) (internal citations and modifications omitted).

In addition, Pressler's citation to the State and Federal statutes relates only to limitations on "the amount of any such garnishment," while 15 *U.S.C.* §1674 relates to restrictions against wrongful termination due to garnishment.

Pressler's arguments that no pre-garnishment notice is required, *Def. Brief at pp. 16-23*, were considered and rejected by the *Giambanco* court. *Giambanco*, 422 *N.J. Super.* at 307 (rejecting sufficiency of notice after commencement of garnishment). Without notice of the rights that they would be giving up, and the consequences of waiving those rights, the recipients of Pressler's consent orders were never in the position to make a knowing and informed waiver; therefore the waiver term in the consent orders in *Giambanco* was deficient. Those same infirmities which were fatal to Pressler's arguments in *Giambanco* are present in the re-cycled arguments presented by Defendant in this matter, and should be rejected here as well.

C. Pressler Unfairly Obtained or Attempted to Obtain an Improper Waiver of Rights in Violation of the Fair Debt Collection Practices Act.

The Complaint alleges that by obtaining or attempting to obtain a waiver from Plaintiff and those similarly situated while omitting and withholding a notice of rights that is required to be given under the New Jersey Court Rules and applicable case law, Pressler committed an unfair and unlawful debt collection practice in violation of the FDCPA. Pl. Compl. ¶¶41-44.

1. Standards Governing FDCPA Claims.

The FDCPA is liberally construed in favor of the consumer to effectuate its purposes. *Cirkot v. Diversified Financial Systems, Inc.*, 839 *F. Supp.* 941, 944 (D. Conn. 1993); *Johnson v. Riddle*, 305 *F.*3d 1107, 1117 (10th Cir. 2002). Statutory damages are recoverable for violations, whether or not the consumer proves actual damages. 15 *U.S.C.* §1692k(2)(A).

Federal and State courts require strict adherence to the Act's explicit terms to accomplish the remedial and preventative goals of Congress. *Frey v. Gangwish*, 970 F.2d 1516, 1519 (6th Cir. 1992); *Hodges v. Sasil Corporation*, 189 N.J. 210, 223 (2007) (citation omitted) ("This Court's duty is clear: 'construe and apply the statute as enacted.'"). The language of the FDCPA is the clearest expression of congressional will and effect must be given to the plain meaning of the statute. *Heintz v. Jenkins*, 514 U.S. at 297-98.

"The FDCPA is a strict liability statute to the extent it imposes liability without proof of an intentional violation." *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 *F.*3d 364, 368 (3d Cir. 2011), *cert. denied* 132 *S. Ct.* 1141, 181 *L. Ed.* 2d 1016 (2012). "Because the Act imposes strict liability, a consumer need not show intentional conduct by the debt collector to be entitled to damages." *Russell v. Equifax A.R.S.*, 74 *F.*3d 30, 33 (2d Cir. 1996); *see also Taylor v. Perrin*

Landry, deLaunay & Durand, 103 *F*.3d 1232, 1236 (5th Cir. 1997); *Bentley v. Great Lakes Collection Bureau*, 6 *F*.3d 60 at 62 (2d Cir. 1993); *Clomon v. Jackson*, 988 *F*.2d 1314, 1318 (2d Cir. 1993).

Courts use the "unsophisticated debtor or consumer" or "least sophisticated consumer" standard when reviewing letters for compliance with the FDCPA. *Veach v. Sheeks*, 316 *F*.3d 690, 692 (7th Cir. 2003) (unsophisticated debtor); *Brown v. Card Service Center*, 464 *F*.3d 450, 453 (3d Cir. 2006) (least sophisticated consumer). "This assumes that the debtor is uninformed, naïve or trusting and that statements are not confusing or misleading unless a significant fraction of the population would be similarly misled." *Veach*, 316 *F*.3d at 692-693 (7th Cir. 2003). "This lower standard comports with a basic purpose of the FDCPA: as previously stated, to protect all consumers, the gullible as well as the shrewd, the trusting as well as the suspicious from abusive debt collection practices." *Brown*, 464 *F*.3d at 454. The least sophisticated consumer standard "is less demanding than one that inquires whether a particular communication would mislead or deceive a reasonable debtor." *Caprio v. Healthcare Revenue Recovery Group, LLC*, 709 *F*.3d 142, 149 (3d Cir. 2013) (*quoting Campuzano-Burgos v. Midland Mgmt., Inc.*, 550 *F*.3d 294, 298-99 (3d Cir. 2008)).

The Court must take the foregoing standards and interpretations of the FDCPA into consideration when evaluating Pressler's failure to comply with the Act. Among other restrictions, the FDPCA prohibits a "debt collector" from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 *U.S.C.* §1692e, a "representation or implication that nonpayment of any debt will result in the … seizure, garnishment, attachment or sale of any property or wages of any person unless such action is lawful…", 15 *U.S.C.* §1692e(4), "any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer," 15 *U.S.C.* §1692e(10), or "unfair or unconscionable means to collect or attempt to collect any debt." 15 *U.S.C.* §1692f. These expansive prohibitions against false, deceptive, misleading, unfair, and unconscionable methods in the collection of debts cover a much broader range of conduct than the narrow list of "abuses" identified by Pressler. *Rosenau v. Unifund Corp.*, 539 *F.*3d 218, 221 (3d Cir. 2008) (the FDCPA "is a remedial statute that we 'construe . . . broadly, so as to effect its purpose.'") (*quoting Brown*, 464 *F.*3d at 453); *Johnson v. Riddle*, 305 *F.*3d at 1117 (identifying the distinction between abusive acts, false or misleading representations, and unfair or unconscionable means, all of which are prohibited by the FDCPA).

An application of these principles to the consent orders that Pressler sent to Plaintiff and those similarly situated demonstrates the manner in which Pressler violated the FDCPA.

2. Pressler's Consent Orders Improperly Withheld Critical Information from Plaintiff and those Similarly Situated.

In this action, Pressler, a law firm which has participated in appellate litigation concerning the details of the mandatory notice required to be provided to judgment debtors prior to the issuance of a wage garnishment, sent consent orders to Plaintiff and those similarly situated that improperly sought a waiver of important rights without providing the requisite notice of those rights and the consequences of a waiver. Plaintiff submits that most if not all of the individuals to whom Pressler sent the consent orders attached to Pressler's attorney certification were also proceeding *pro se*, although it is not possible to make this determination without viewing the unredacted documents that Pressler submitted with its motion.

It was improper and unlawful for Pressler to require Plaintiff and those similarly situated to engage in specialized legal research prior to executing a waiver, especially under the "least sophisticated consumer" standard, just to find out what their rights are, when the responsibility to notify the consumer clearly and specifically falls upon the debt collector. *Jeter v. Credit Bureau, Inc.*, 760 *F.*2d 1168, 1173 (11th Cir. 1985) (noting that the FDCPA "was not made for the protection of experts, but for the public…") (quotation omitted); *Russell*, 74 *F.*3d at 34 ("[t]he test is how the least sophisticated consumer – not one having the astuteness of a "Philadelphia lawyer" or even the sophistication of the average, every day, common consumer – understands the notice he or she receives.").

Contrary to Pressler's argument, Plaintiff's claim does not presume that the least sophisticated consumer will look up the statutes referenced, *Def. Brief at 22*; rather, the claim is that Pressler in its consent orders failed to include the information it was required to provide to Plaintiff and other consumers concerning the rights they were being asked to waive. Even if Plaintiff and others similarly situated carefully read the entirety of the consent orders, they still would not be informed of their rights, and would refer to other sources to learn of these rights. Such an imposition is highly problematic. The underlying FDCPA purpose of consumer protection does not shift the burden of notice to the consumer, thus Pressler's suggestion in brief that the judgment debtor can use their personal computer or visit the public library to research the Court Rules in order to learn of their rights is entirely improper, especially where, as here, due process is implicated. Law enforcement officers do not tell criminal suspects to use their internet access or visit the public library to learn of their *Miranda* rights while they are making an arrest.

The New Jersey statutes, Court Rules, and case law interpreting the statutes and Court Rules very clearly require that a judgment-creditor seeking a waiver of a judgment debtor's rights with respect to wage garnishment must provide a complete and adequate notice of the substance of the rights being waived and the consequences of waiving those rights, not just a reference to the statutes establishing the rights. *See Giambanco*, 422 *N.J. Super.* at 307 ("Prior notice informs the judgment debtor … (2) the amount which is permitted to be deducted, (3) the protections against discharges, discipline, or discrimination by an employer because of wage garnishment, (4) the process by which to oppose the order and request a hearing *prior* to wage garnishment ….") (emphasis in original). As set forth above, Pressler's consent orders failed to do so, and instead only provided a reference to the statutes and Court Rules that contained a description of the rights.

3. The Consent Orders Created Unfair Advantages for Pressler Against Consumers Who Were Entitled to Clear Notice of the Rights They Were Being Asked to Waive.

The improper advantages afforded to Pressler by omitting information -- such as the amounts that are permitted to be garnished from a judgment debtor's wages, the prohibition against employer retaliation, and the right to request a pre-garnishment hearing -- cannot be overstated and should not be countenanced.

As the *Giambanco* court recognized, without knowing the limitations on the amount that is permitted to be garnished, a judgment debtor may unknowingly agree to voluntary payments that exceed the amount that would be taken from their wages. *Giambanco*, 422 *N.J. Super.* at 312. Thus, if a judgment debtor is to make a knowing and informed decision to waive such an important protection, he or she must actually be told of the protections being waived; otherwise, an uninformed decision and the resulting payment of funds that would otherwise be exempt would defeat the protections established by State and Federal law.

The Court Rules require that the judgment debtor receive notice of the prohibition against employer retaliation against an employee subject to a wage garnishment order, which is codified at 15 *U.S.C.* §1674. *See R.* 4:59-1(e) ("The notice of wage execution shall state … (2) the limitations prescribed by 15 *U.S.C.A.* §1671-1677, inclusive….”); Appendix XI-I (“Your employer may not discharge, discipline or discriminate against you because your earnings have been subjected to garnishment.”). Absent this knowledge, a judgment debtor could agree to make “voluntary” payments that they are not able to afford because of an understandable fear that a wage garnishment order would have consequences for his or her employment. However, the interference of debt collection with an individual’s employment was one of the abuses that the FDCPA specifically seeks to prevent. 15 *U.S.C.* §1692(a) (“Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.”).

In addition, by representing in the consent order that nonpayment of the alleged debt would result in the garnishment of the wages of Plaintiff and those similarly situated, but simultaneously failing to provide Plaintiff and those similarly situated with a complete and proper notice of their rights under *N.J.S.A.* 2A:17-50 and *Rule* 4:59-1(e) and the consequences of a waiver of those rights, Pressler violated 15 *U.S.C.* §1692e(4), because any garnishment without a complete and proper pre-garnishment notice would be unlawful. Pressler’s decision to forego the use of Appendix XI-I, which “shall be used” in all Law Division and Special Civil Part cases pursuant to *Rule* 4:59-1(i), and which has been developed by the New Jersey Courts to provide a proper notice of rights to judgment debtors concerning wage garnishments, also constitutes a deceptive, misleading, unfair and unconscionable debt collection practice in violation of the FDCPA at 15 *U.S.C.* §1692e, 1692e(10), and 1692f.[2]

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[2] Pressler’s protestations against Plaintiff’s claims pleaded under the “catchall” provisions of the FDCPA are contrary to judicial interpretation of these terms. *See Allen*, 629 *F.*3d at 367 n.4 (“Section 1692f, however, broadly prohibits improper means ‘to collect or attempt to collect’ any debt, and its list of violative conduct in §1692f is not exhaustive.”).

The foregoing demonstrates the significant imbalance created by Pressler's consent orders. This imbalance impinges upon the due process rights of Plaintiff and those similarly situated, and is directly contrary to the New Jersey statutes, Court Rules, and case law. Pressler's use of this imbalance to improperly obtain or attempt to obtain a waiver of rights from Plaintiff and those similarly situated constitutes the use of false, deceptive, and misleading representations and/or unfair or unconscionable means in its efforts to collect alleged debts, in violation of the FDCPA at 15 *U.S.C.* §1692e, 1692e(10), and 1692f.

4. Pressler Should Be Held Liable for FDCPA Violations for its Conduct in Connection with Litigation.

Pressler's assertion that its conduct is protected because such conduct purportedly occurred within the context of litigation is misplaced. *See Def. Br., at 22.*

This action is based on the conduct of Pressler acting as a debt collector in post-judgment attempts to collect a debt from Plaintiff and those similarly situated. *See Allen*, 629 F.3d at 368 ("The focus of § 1692f is on the conduct of the debt collector."). The fact that courts in New Jersey apparently have entered consent orders in the same form as the consent order presented to Plaintiff does not mean that Pressler complied with the FDCPA in obtaining the subject waivers.

Thus, as an initial matter, "the New Jersey litigation privilege does not absolve a debt collector from liability under the FDCPA." *Allen*, 629 F.3d at 369 (internal citations omitted). The FDCPA applies to the litigation conduct of debt collection attorneys. *Id.* at 369 ("Common law immunities cannot trump the FDCPA's clear application to the litigating activities of attorneys.") (quotation omitted); *Piper v. Portnoff Law Assocs. Ltd.*, 396 *F.*3d 227, 232 (3d Cir. 2005) ("Attorneys who regularly engage in debt collection or debt collection litigation are covered by the FDCPA, and their litigation activities must comply with the requirements of that Act.") (*citing Heintz v. Jenkins*, 514 *U.S.* 291).

More importantly, Plaintiff's claims do not create any conflict between the New Jersey statutes and case law and the FDCPA. *See* 15 *U.S.C.* §1692n (debt collectors are required to comply with all State laws that are not inconsistent with the FDCPA). Plaintiff's claims arise out of the fact that Pressler did *not* follow the procedure set forth in the Court Rules for obtaining a post-judgment wage execution, but instead chose to create a new form that omits critical information concerning the rights of judgment debtors. For that reason, Plaintiff and those similarly situated were not "protected by the court system," when they received a consent order from Pressler.

Pressler's circumvention of the procedures set forth in the Court Rules for obtaining a post-judgment wage garnishment is made clear when this court considers the procedure for obtaining an order to pay a judgment in installments by motion. If Pressler had filed a motion pursuant to *N.J.S.A.* 2A:17-64 for an order to require the judgment debtor to pay in installments, as opposed to a consent order, the court would be required to make a finding that the installment payments did not exceed the limits established by State and Federal law. *See Iqbal v. Mucci*, 371 *N.J. Super*. 65, 68 (App. Div. 2004) ("Despite the ability of a creditor to get installment payments toward his judgment from wages, federal law sets limits the 'maximum part of the aggregate disposable earnings of an individual for any work week'….") (*quoting* 15 *U.S.C.* §1673(a)(1)).

In *Iqbal*, the judgment debtor was already subject to one wage garnishment to pay his wife and children, and the court denied the judgment creditor's motion under *N.J.S.A.* 2A:17-64 to order the debtor to pay a judgment in installments. In the claims asserted in this matter, by proceeding with a consent order for a payment in installments as opposed to filing a motion for that relief, Pressler has sought to perform an "end-run" around the proper exercise of judicial scrutiny because the court would have no way of knowing whether the judgment debtors were already subject to an existing wage garnishment, rendering the installment payment order improper under *Iqbal*.

Moreover, Pressler has presented no evidence that the courts that entered these consent orders conducted any review of the sufficiency of the waiver term or the specific issues presented in the present action (nor would such evidence be admissible in the context of a motion for judgment on the pleadings). As noted by Pressler in its brief, "the settlement of civil litigation ranks high in the public policy of New Jersey," *Def. Brief at p. 12*, and the courts would be ill-served to examine the content of every consent order presented when no issues had been raised by either party. The consent orders entered in connection with other matters are not evidence that Pressler's conduct was proper in obtaining waivers from the judgment debtors. Compliance with the FDCPA is not established by *fait accompli*.

Pressler cannot be heard to argue that it was unaware of the proper manner to deliver adequate notice to judgment debtors, since the New Jersey Courts have created a model notice in the form of Appendix XI-I to the Court Rules. *See Def. Brief at pp. 15-16* (*citing Seker*, 171 *N.J.* at 515).

The standards governing waivers of post-judgment wage execution rights were clearly established in the *Giambanco* decision.[3] For the reasons set forth above, Pressler's consent orders fail to comply with the requirements set forth in *Giambanco*. Ms. Watkin's decision to contact an attorney after receiving the consent order does not absolve Pressler from its unlawful attempt to obtain an improper waiver from her, nor does it excuse Pressler's conduct with respect

[3] The holding of the unpublished decision of *New Century Financial Services, Inc. v. Catanzareti*, A-3435-03T2 (App. Div. June 7, 2005), is directly contrary to the holding of the subsequent published decision in *Giambanco*, and therefore should be given no precedential weight.

to the other individuals to whom it sent consent orders.

Pressler's violation of the FDCPA occurred at the time it sent the consent orders to Plaintiff and those similarly situated, not when the consent orders were signed, and its improper conduct is not protected by the litigation privilege.

CONCLUSION

Plaintiff has adequately pleaded an FDCPA claim by alleging that Pressler, a debt collector, committed unlawful acts in attempting to collect consumer debts by sending Consent Orders to Plaintiff and those similarly situated that contained an improper waiver of important rights concerning post-judgment wage garnishment. Plaintiff has identified the specific required information that Pressler failed to include in its Consent Orders, and the deleterious effects of the omission. By failing to provide the information required by law, Pressler rendered it impossible for Plaintiff and those similarly situated to make any knowing and informed decision to waive the important rights, which Pressler sought to obtain for an improper advantage.

It is therefore respectfully requested that the Court deny Pressler's motion for judgment on the pleadings, in its entirety and with prejudice, or, alternatively, in the event that the Court is inclined to dismiss the present Complaint, that Plaintiff be afforded an reasonable opportunity to amend the Complaint.

Respectfully submitted,

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